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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION TWO. AND IN THE SUPREME COURT OF THE UNITED STATES

Calif. Crim. No. 3693

ROGER EVIN JONES, *Appellant*,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA, *Appellee*.

STATEMENT OF JURISDICTION ON APPEAL.

In compliance with Rule 12, appellant herewith presents his statement of jurisdiction on appeal:

A.

The statutory provisions which sustain jurisdiction are Section 237 Judicial Code, 28 U. S. C. A. 344 as amended by Act of January 31, 1928, Chap. 14, Stats. 54, an Act of April 26, 1928, Chap. 440, 45 Stats. 466.

B.

The questions involved in this case are the following:

The Fourteenth Amendment to the Constitution of the United States provided, "• • • nor shall any state de-

prive any person of life, liberty or property without due process of law."

The question therefore arises under this Amendment whether the defendant has been deprived of due process of law by the provisions of sections 950, 951 and 952 of the Penal Code of the State of California, inherently and as construed and applied in this case.

Also, whether a trial of a defendant under three conflicting statutes of the Penal Code, involving different or conflicting elements of the crimes alleged, can be consolidated under one heading under these three different and conflicting sections, and in this manner violate due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

The statutes involved under this construction are sections 484, 492, 503, 511 and 532 of the California Penal Code, and the question involved is whether these sections, inherently, and as construed and applied in this case, are violative of the Fourteenth Amendment to the Constitution of the United States.

Another question involved is whether the turning over of books and records by the Federal Securities and Exchange Commission, after it had subpoenaed these books and records under a subpoena duces tecum under federal law, to a state court to be used in a state action against the defendant, violated his rights under the Fourteenth Amendment to the Constitution of the United States.

A further question involved in this case is whether the transactions of which the defendant was convicted were anything more than civil transactions.

The case also involves the question as to whether the defendant was denied a fair trial when evidence was put into the case against him which was not charged against him in any indictment.

The case also involves the question of whether the defendant was accorded a fair trial as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

A further question involved is whether the defendant's having been taken to the district attorney's office for questioning, and having declined to make any statements to the district attorney, could be used against him, although such a procedure is in violation of the provisions of Article I, section 13 of the Constitution of California, which is similar to the provisions of the Fifth Amendment to the Constitution of the United States, and which has received a contrary interpretation by the United States Supreme Court.

C.

The opinion of the District Court of Appeal of the State of California was rendered on December 6, 1943, and a petition for hearing was denied by the Supreme Court of California on January 6, 1944. The petition for appeal, assignment of errors and prayer for reversal were filed in the District Court of Appeal of the State of California on January 13, 1944.

D.

Nature of Case and Rulings Below.

The nature of the case has been set forth under "B" above.

The Superior Court, during the trial of the case, ruled against the claimed violations of the defendant's rights under the Fourteenth Amendment. The District Court of Appeal of the State of California affirmed the judgment of the Superior Court on December 6, 1943.

In his petition to the California Supreme Court the appellant again challenged the opinion of the District Court

of Appeal and the rulings therein which affirmed the actions of the Superior Court, as denying to appellant due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Appellant also raised, both in the District Court of Appeal and in the Supreme Court, the validity of the proceedings under the various statutes named above in "B".

Appellant also challenged the rulings of the court below, as to whether he had been denied a fair trial guaranteed by the Fourteenth Amendment when each and all of his instructions on his theory of the case were denied in the Superior Court in the trial of the case.

Respectfully submitted,

MORRIS LAVINE,
Attorney for Appellant.

Statutes and Cases Believed to Sustain Jurisdiction.

Title 28, Section 344, United States Codes Annotated:

Lisenba v. *California*, 86 L. Ed. 179;
Whitney v. *California*, 274 U. S. 357;
Fiske v. *Kansas*, 274 U. S. 380;
Stromberg v. *California*, 283 U. S. 359;
Galpin v. *Page*, 18 Wall. (U. S.) 350;
Powell v. *Alabama*, 287 U. S. 45, 77 L. Ed. 158;
Mooney v. *Holohan*, 294 U. S. 103, 79 L. Ed. 791.

APPENDIX.

Opinion of the District Court of Appeal.

In the District Court of Appeal of the State of California, Second Appellate District, Division Two.

The People of the State of California, Plaintiff and Respondent, vs. Roger Evin Jones, Defendant and Appellant. Criminal No. 3693.

Appeal from the Superior Court of Los Angeles County, Honorable Arthur Crum, Judge.

For Plaintiff and Respondent: Robert W. Kenny, Attorney General; Bayard Rhone, Deputy Attorney General; Fred Howser, District Attorney of Los Angeles County; Jere J. Sullivan and Jesse J. Frampton, Deputies District Attorney.

For Defendant and Appellant: Morris Lavine.

Defendant was convicted on 17 counts of grand theft of which he had been accused by indictment. He was found not guilty on four other counts and was granted a new trial on one. He was sentenced to state prison on each of the 16 verdicts for a term of years. His 17 grounds of appeal from each judgment may be reduced to four, namely: (1) the insufficiency of the indictment; (2) the insufficiency of the evidence; (3) the refusal to give instructions offered by defendant; (4) errors in ruling upon offered evidence.

The specific crimes of which he was convicted are that by artifice he induced certain of the complainants to advance to him moneys for the purchase of whiskey; others to deliver to him their warehouse receipts for whiskey, hereinafter referred to as receipts. He commenced his operations about February 14, 1940. In order to expedite the accomplishment of his purposes defendant stated in substance to each of his contractees that the latter could more readily sell his stored liquor and at a greater profit than by a sale of it in bulk if it were first bottled; that he would have the whiskey bottled and sold on a specified date and the proceeds, less a certain percentage for handling, would be paid to the contractees. It is the theory of the prosecution that

as a part of his trick or device to obtain possession of the valued instruments he prepared a form of bottling contract whereby the owner of the receipt ostensibly agreed with R. E. Jones & Co., appellant's corporation, for the purchase of whiskey. One by one the trusting owners of the outlawed merchandise, as well as the other confident investors who during the same period entrusted large sums to defendant for the purchase of whiskey, became convinced that Jones had appropriated their receipts or moneys to his own use. Having heard their several experiences the grand jury returned the indictment. Defendant's criticism of the pleading is (1) that it failed to specify an offense; (2) that the phrase "warehouse receipts" is a conclusion; and (3) the "nature of the offense" is not alleged.

The Indictment is Sufficient.

An accusation drawn in conformance with statutory requirements is sufficient. Each count contains a statement in ordinary and concise language that the accused has committed a specified public offense without any allegations of matter not essential to be proved. (Sec. 952 P. C.) It fully informs the accused of the crime charged against him. The reasons for the technical requirements at common law no longer exist. Properly to accuse a person under existing procedure he must be provided with a copy of the testimony heard by the grand jury or by the committing magistrate. By the testimony and the concise accusation he is fully advised. (Beesly, 119 Cal. App. 82, 84.) By reason of the repeal in 1927 of subdivisions 6 and 7 of section 959 requiring the act to "be clearly and distinctly set forth * * * in such a manner as to enable a person of common understanding to know what is intended * * *" it must have been the intention of the legislature to make an indictment sufficient if it complies with the remaining provisions of that section and with sections 951 and 952. Section 951 contains a form whereby to accuse one of a public offense. The use of it in drafting an accusation, in the main, disposes of technical criticism. An indictment was held to be sufficient in charging that the accused "unlawfully took the property

of one Marello consisting of 30 shares of the Bank of Italy stock, Certificate No. B-34, 302, of the reasonable value of Sixty Three Hundred Dollars, more or less, lawful money of the United States." (Robinson, 107 Cal. App. 211, 217.) The case of Davenport (21 Cal. App. (2d) 292) does not apply. That gentleman was accused of violating the Corporate Securities Act in that he sold an "investment, contract," without having obtained a permit from the Division of Corporations. The vice of the Davenport information lay in the fact that the term "investment contract" was a conclusion of the pleader. Since there was neither pleading nor evidence before this court of the nature of the contract, it could not be determined whether or not "investment contract" fell within the provisions of the Corporate Securities Act. Under that situation it behooved this court to assume that the contract was one which could lawfully be sold without a permit.

The Evidence Was Sufficient.

Most of the "sellers" of receipts were former clients of the Jones Company. Some of them had bought their receipts as investments. Past association had begotten a degree of confidence. But Jones did not rely altogether upon such confidence in proceeding with his new venture. He resorted to an effective strategy more completely to overcome resistance. Taking his cue from a proposal made to him by the United Bottling and Distributing Company of Chicago, which had sought to engage Jones to assist in obtaining for that corporation the receipts of the Jones' clients, defendant prepared a form for a bottling contract between his own corporation and the owners of receipts. Such form as used in the first transaction is as follows:

"R. E. Jones & Co., Inc., 315 West Ninth Street, Los Angeles, California.

Contract

Frank G. Lilygreen, 2650 Flower Street, Huntington Park, California, hereinafter called the Seller, and R. E.

Jones & Co., Inc., hereinafter called the Buyer, contract and agree by and between themselves unto the following:

1. The Seller hereby sells and assigns to the Buyer the following whiskey:

Number of Barrels	Description
35	Bernheim, January & February 1936 distillation Above whiskey to be bottled in August, 1941.

Title to pass upon delivery to the Buyer from the Seller of appropriate whiskey warehouse receipts and execution of this agreement.

2. The Buyer intends to have said whiskey bottled after the same has reached four years of age or over and will offer the bottled goods for sale. Within thirty days after said whiskey has been bottled for sale the Buyer shall pay to the Seller such amount which the Buyer receives from the sale of said bottled goods (such sale to be made at the then prevailing Chicago market price), less all taxes, costs, expenses advanced or incurred by the Buyer in connection with the withdrawal of the whiskey from storage, transportation, bottling, stamping, labeling and $1.50 per case (Buyer's selling expense and profit). The Buyer reserves the right to have bottled and pay for (as herein contemplated) portions of the said whiskey from time to time as it reaches four years of age or over.

3. The Seller vouches himself to be the true and lawful owner of the said goods with full right and authority to dispose of the same in the manner aforesaid and further agrees to warrant and defend the said goods to the said Buyer against all claims and demands. Accepted at the Office of the R. E. Jones & Co., Inc., Los Angeles, California.

Dated February 14, 1940.

Frank G. Lilygreen (Seller). R. E. Jones & Co., Inc., By Roger E. Jones (Buyer)".

By the use of this form and by his simultaneous declarations and promises defendant persuaded his clients to execute contracts and thereby gained possession of their receipts. The value of the receipts of each of the complainants was established by expert testimony and by proof of the sums received from actual sales of the whiskey in bulk. Those values ranged from $202.00 to $4,645.00.

Instead of placing each warehouse receipt in a trust or escrow, as he had promised each party, to wait until the time for bottling should arrive, he made a sale of the whiskey represented by the receipt within two weeks after obtaining it. In one or two of the transactions the Jones Company was indebted to the vendee, in which event the proceeds of the sale of the liquor represented by the receipt were credited by the vendee to the account of R. E. Jones and Co. Following all of the other sales the money received by the defendant was deposited in the bank account of appellant's corporation at Los Angeles and was thereafter checked out by defendant in payment of the operating expenses of that company and of the expense of developing a mine at Downieville, California.

The criminal intent of defendant was further shown in that prior to the fall of 1939 the only source of income of the Jones Company was the sale of receipts. Commencing with January, 1940, that corporation transacted none of its customary business. For the year 1939, it had sustained a loss of $9,669.00. But from January, 1940, until May, 1941, it received $23,137.00 from the sales of the receipts taken from the complainants, and the further sum of $13,182.00 taken from three investors for the purpose of purchasing whiskey for them. Thus the total sum from both sources was in excess of $36,300.00, $30,439.00 of which was expended in the development of the mine.

Prior to 1940, Jones had associated with him in buying and selling receipts one Jasper, each owning fifty per cent of the Jones Company stock. They organized the Caledonia Development Company, hereinafter referred to as the Caledonia, to exploit and develop their mining property and veritably flooded its stock, which, with its water, was carried on the corporate books at a grossly exaggerated value. They had 200,000 shares issued to themselves for the mine

of a book value of $9,560.00. Jones and his company controlled the Caledonia. Besides these worthless Caledonia stocks the Jones Company carried on its books at grossly exaggerated values a number of worthless accounts.

Upon the decline of the whiskey market and of investments in whiskey warehouse receipts in the fall of 1939 appellant sent Jasper to Downieville to supervise the mining operations while he remained in the Los Angeles office of the two corporations. Before January 1940 Jasper had returned to Los Angeles to urge upon Jones the need of a Trommell screen and of additional money with which to operate the mine. Defendant told him to procure the needed equipment; that the money would be available. Jasper returned to the mine and soon deposits began, and continued to be made at Downieville until the $30,439 had been received and expended. Prior to April 1941 defendant had consummated all of the transactions which furnished the bases of his indictment in May, 1942. While Jones was negotiating for the receipts the books of both corporations were kept in his office by the same bookkeeper, and defendant from time to time examined them. At appellant's request Jasper severed his connection with both corporations in September, 1940.

Defendant argues that the deal with each "seller" was a civil transaction; that there was no proof of the existence of any warehouse receipts or of the inability or in disposition of defendant to fulfill them; that there was no proof of the value of the receipts; or of a breach of the bottling contracts. But established facts show that by the time appellant's business of dealing in receipts had failed to produce a profit he had become enamored of the mining venture, needed money to develop it and perceived that the whiskey business offered no legitimate channel whereby to gain the necessary funds. With his imagination lilting with visions of fortunes from gold he launched his campaign to gain possession of the receipts of his erstwhile patrons. Cloaked in the draperies of his corporation and pretending to act in its behalf, he boldly approached his unsuspecting victims. He assured them that he would not only save them from loss, but would make them profits. Viewing his scheme most charitably and conceding that he in-

tended ultimately to repurchase the whiskey, bottle and sell it and remit to the owners, yet he could have planned to do no less than to gain possession of the receipts, convert them promptly into cash and utilize the proceeds in developing his mine. He may have intended there to make a "clean-up," return and repurchase the receipts. But no such design was divulged to his victims. He caused them to believe that their receipts would be held in an escrow until the whiskey should be removed from storage to be bottled and sold for their accounts. After months had passed he lethalized them with his false reassurances that their receipts were being held by a Chicago firm and that they would suffer the loss of much money if the whiskey were bottled on the date he had originally designated. So eager was he to acquire the funds needed for his favorite enterprise that he bargained with a Mr. Bailey to purchase and bottle 300 barrels at a cost of $10,500.00, $8,000 of which sum was actually paid to defendant in small, semi-monthly installments. He consummated a similar transaction with the witness Williams, who paid a total of $2,008.36 for forty-five barrels. When that gentleman made final payment of $800 in February 1941 he received the bottling contract but never obtained the 45 barrels or a warehouse receipt or the money he had paid to defendant. Of the 16 complainants whose losses support the judgments, not one received any portion of the sum advanced, with the sole exception of Mrs. Lundquist, to whom Jones repaid $200 of the $3,263.42 advanced by her on the purchase of 150 barrels of whiskey. When she offered to pay the balance of the $4,500 he advised her that he had sold her receipts and that the $200 was a partial payment.

Upon proof of such facts the jury was amply warranted in returning the verdicts. The bottling contract and the false representations and promises of defendant constituted a trick and device by which defendant gained possession of the receipts while his victims did not intend to part with title. He dissipated the moneys thus garnered on his two corporations, in which not a complainant had the slightest interest. This was done by his checking the funds out of the bank in which he had deposited them to the account of the Jones Company. Although each deal in its incipiency

bore the color and trappings of a normal, civil contract, yet when subjected to a post-mortem it exhaled the stench and disclosed the carcass of a fraud. (Epstein, 118 Cal. App. 7, 10.) There appears no sign of good faith at any turn. Each taking and appropriation was a grand theft. The use of the corporate name and the promises made in accomplishing his purpose were a camouflage of such common variety that no excess of genius was required to discern the fraud. Parol evidence of all that occurred was admissible to show the intention of defendant. (Robinson, 107 Cal. App. 211, 221.) Not one contractee suspected at the time of receiving his contract that before the next change of the moon his receipt would have passed to some stranger.

The contention that there was no proof of the existence of the receipts is without support. Each complainant testified that he had delivered his receipts to Jones, who testified himself that he had received them under a bottling contract and thereafter sold the liquor in bulk. Their profert could have added nothing to the sum total of the evidence of their theft. Their existence at the time of their acquisition and embezzlement was firmly established. Their exact language was collateral and therefore immaterial.

Appellant insists that there was no proof that he breached his contracts. But to each contractee he promised to "have said whiskey bottled" and sold and the proceeds less specified deductions remitted to "seller." He did not assume the payment of any charges subsisting or to accrue against the whiskey but only the right to deduct any such tax or other expense as he might have been required to pay. In all of the sales by Jones of the whiskeys represented by the receipts taken from complainants the purchasers assumed all obligations which constituted liens on the stored merchandise. Furthermore, the contention that there was no proof that Jones breached his contract is immaterial. Despite the language of the bottling contracts the jury were justified in finding that those contracts and appellant's promise to escrow them were a snare, or an artifice, or a trick, for procuring possession of the coveted receipts, and that they were promptly sold and the proceeds dissipated by defendant. His subsequent deceitful statement that to sell

the whiskey at a still later date would be more profitable than to bottle and sell it at the time originally promised was made to calm the fears of his victims and to induce them to feel secure while he negotiated with fate for the continuance of his liberty.

It is not to be concluded that the case was tried upon the theory that whiskey was stolen because the prosecutor at times asked a complainant while testifying whether he had told defendant that he might sell his whiskey in bulk. The very contracts issued to complainants on which appellant places reliance as proof of his innocence provided for delivery of "appropriate whiskey warehouse receipts." Each complainant testified in effect that he delivered his receipts to Jones at his office, and got in turn a bottling contract. By the preliminary questions concerning the whiskey owned or with reference to its value it was not intended to adopt "theft of the whiskey" as the theory of the prosecution. The receipts were negotiable. They were delivered to appellant who in turn passed them along to his vendees. In its instructions the court advised the jury that if the thing stolen is a written instrument "the value of the property the title to which is shown thereby • • • is the value of the thing stolen." (Sec. 492, P. C.) Such facts indicate clearly that theft of the receipts or the embezzlement of the moneys received for them was the theory of the prosecution.

There Was No Prejudicial Error in the Instructions

Every phase of the law properly applicable to the issues was presented by an appropriate instruction. It was therefore not incumbent upon the court to read any instruction offered by defendant. His complaint that he offered 100 instructions not one of which was accepted is without merit. Actually he submitted 84. The availability of an offered instruction is not determined by the size of the volume of which it is a part. Each must be appraised according to its own merits and its use must be determined by the exigencies obtaining.

The assignment as error that the jury were not properly advised that they must agree upon which of the three the-

ories of theft as defined in section 484 of the Penal Code was committed is without support. Such instruction was unnecessary. (Caldwell, 55 Cal. App. 2d 238, 255.) In each count he was accused of grand theft. The jury were privileged to determine as to each count only whether that crime had been committed. By which of the methods of the committing grand theft, embezzlement, larceny by trick and device, or false pretenses was unimportant. All of the theories of theft were properly defined to the jury and the elements of each were named. Also, there was the added instruction that they must find, beyond a reasonable doubt under any theory, that he appropriated the receipt, or the money entrusted to him for investment, feloniously with intent to steal and that he gained possession of the receipts or money by false pretense or by trick and device. If they did so find with reference to the warehouse receipts or the moneys advanced it was inconsistent with a taking "openly and avowedly and under a claim of title preferred in good faith * * *." (Section 511, P. C.) Had the jury believed defendant, the instructions given were sufficient authority to acquit him. The moment he appropriated the funds belonging to his clients to the use of his corporations the crimes of grand theft were committed. (Talbot, 220 Cal. 3.)

Four of the refused instructions bore upon the good faith of defendant. For an accused to be entitled to an instruction that he must be adjudged innocent if he took the property openly and avowedly and under a claim of title in good faith, it must reasonably appear from the evidence that such defense is made in good faith. (Photo, 45 Cal. App. 2d 345, 353.) The record discloses no honest purpose of Jones but only his zeal to acquire and promptly sell the receipts and to appropriate the proceeds. The contracts alone evince a purpose to outsharp the "seller." Nothing was paid. No obligation of the owner was assumed. In November 1941 appellant wrote eastern dealers for prices on bottling whiskey he "controlled," whereas the whiskey had been sold months before. Moreover, the sales of the whiskey while he held the receipts in trust dispels at once all right to assert a claim of title in good faith (Steffner, 67 Cal. App. 23). That he might have intended to regain

the receipts from his vendees is no defense or evidence of good faith if in fact he did not do so. (Brackles, 54 Cal. App. 40.)

Defendant submitted to the court some 24 instructions to acquit him of responsibility because the transactions of the "sellers" were with the Jones Company. By this host of instructions defendant sought to make the corporation alone civily liable for the conversion of the receipts. They constitute a series of arguments to persuade the jury that the bottling contracts vested title to the receipts in the Jones Company, an "artificial creature," distinct from its officers; that the latter may act as corporate agents and not be personally liable; that inasmuch as Jones, as such agent, received the receipts for the corporation, which sold them, he should be acquitted; that unless the contracts bound Jones personally, he is not criminally liable; that if Jones entered into the contracts on behalf of the corporation, he must be acquitted. These instructions assume that the corporation was an innocent creature, and had no knowledge of the fraudulent device of its master who must be without guilt because of the innocence of his artificial agent. Number 24 would absolve corporate officers from fraud if committed in acquiring property for the corporation; number 25 was an attempt to order an acquittal upon the mere finding that the transfer of the receipts passed title. Both omitted all reference to the fraud practiced or to the artifice executed upon the owners of the receipts. It is the duty of the trial court to refuse an instruction to acquit a defendant upon one certain phase of the evidence regardless of other proof and of other theories presented. (Clark, 145 Cal. 727, 729.) The remainder of this group of defendant's rejected instructions (26, 27, 29, 34, 35, 36, 37, 40, 41, 48, 49, 50, 51, 81) constitutes a series of declarations which in effect acquit a corporate officer of fraudulent acts if it be shown that the corporation thereby acquired title to the fruits of his crimes. Such is not the law. Where a corporation is under the control of one person who violates penal statutes by use of the corporate name, the artificial entity will be ignored while the person who actually commits the criminal act will be dealt with as an individual. (Epstein, 118 Cal. App. 7, 10.)

Five rejected instructions (1-A, 1-C, 2, 5, and 30) all in effect declare that the existence of a specific intent to steal is an element of grand theft that must be proved. In each of the instructions given on larceny, embezzlement, and false pretense, the existence of the criminal intent was defined as an essential element with a statement as to the time that intent must have entered the mind. It was therefore not error to refuse the proffered instructions on that feature of the law. (Robinson, 107 Cal. App. 211, 228.)

Nine offered instructions (6, 7, 8, 14, 44, 45, 62, 73 and 79) would have advised the jury that the nature of defendant's transactions must be determined by the bottling contracts. Such is an erroneous concept of the law. The state was not a signatory to those instruments (Robinson, *supra*, p. 221) and was not bound thereby. The contracts were merely a part of the machinery employed in perpetrating the trick to gain the receipts. (Martin, 102 Cal. App. 558, 568.)

With reference to 33 of the proffered instructions bearing upon theft, 12 of them (10, 42, 53, 59, 63, 63A, 65, 70, 71, 72, 86, 87) are attempts to state the law which was correctly given by the court. The remaining 21 contain either misstatements of the law or they omitted essential elements. The ability of defendant to replace the receipts would not have entitled him to an acquittal as declared in number 11. (Sec. 514 P. C.); Talbot, 220 Cal. 3, 10.) Number 12 would have imposed upon the state the burden of proving the existence of the merchandise represented by the receipts. The whiskey might have been burned or removed by burglars after its storage. All such instructions stultify defendant in view of his own testimony that he had sold the whiskey for his corporation. Number 13 omitted to say that continued possession may be inferred from the issuance of the receipt. (Sec. 1858, Civ. Code.) Number 17 omitted all reference to the question of the alleged fraud, or trick used in gaining possession of the receipts, but merely states that title may be passed as in the case of any negotiable instrument. In like manner we might continue with the other instructions on theft by showing their several erroneous contents or fatal omissions, but the discussion would be mere repetition. Most of them demonstrate an attempt on the part of defendant to effectuate a favorable verdict by a con-

sideration of the bottling contracts only to the exclusion of the deceptive arts practiced by him. It was not incumbent upon the state to prove that the whiskey was in storage at the date of trial. Defendant testified that he had already sold it in bulk.

Many of the rejected instructions contain statements which would have deprived the jury of its privilege of finding the facts from all of the evidence. Proof of the financial status of defendant's corporations was rendered necessary by reason of his assertions in court that the Jones Company and the Caledonia had assets sufficient with which to recompense the complainants. Such proof, adverse to defendant's assertions, and the argument thereon were proper, and the instruction (89) to disregard them would have been error. Moreover, that instruction declared positively that there was no evidence that the stock of either corporation was watered.

Finally, the five proposed instructions (66, 67, 80, 88, 90) bearing upon the evidence are either repetitious or they are in themselves erroneous. Moreover, 66 is argumentative. Number 67 in effect says that the evidence is reasonably susceptible of two interpretations and that the jury are to adopt the one leading toward innocence. Such an instruction would be applicable only in a case in which the proof is all circumstantial. (Marvick, 44 Cal. App. 2d 858, 861.)

Number 88 is neither more or less than an argument in justification of defendant's refusal to make a statement to the district attorney when that officer was investigating defendant's acquisition of the receipts. It does not correctly state the law. Silence under accusation of the police is evidence tending to prove guilt. (Sanchez, 35 Cal. App. 2d 231, 235.) Its weight as evidence is for the jury. The jurors might properly have reasoned that if defendant believed at the time of the investigation he had merely engaged in civil transactions with complainants, he would have said so to anyone. The court instructed the jury that the testimony with reference to Jones' refusal to be interviewed by the district attorney should be considered as evidence of impeachment only. Number 90 would have denied the jury the right to consider as proof a certain letter written by witness Smith to the United Bottling Co. and received

in evidence as a part of the *res gestae* of Smith's deal with defendant. The letter was some corroboration of the testimony of Smith, who had written the letter to United Bottling Co. after appellant had falsely told Smith that he had sent Smith's receipts to that company.

No Prejudicial Error in Rulings on Offered Evidence

While under cross-examination appellant was asked certain questions in order to ascertain whether he had not refused to make a statement to the district attorney on March 18, 1942, relative to his connection with the Jones Company on the ground that it might tend to incriminate him. The basis of the objection to each question was that it was not proper cross-examination. It is true that on his direct examination, nothing had been asked him by his own counsel concerning such statement. But the question was not asked to gain proof of guilt but, as the court stated, "by way of impeachment only." The court's ruling did not impair appellant's constitutional privilege of declining to discuss the matters under investigation. (Kynette, 15 Cal. 2d 731, 749.) Therefore, it was proper for impeachment purposes. (Sec. 2051, Code Civil Proc.) That he may at that time have acted upon the advice of counsel did not make it inadmissible. (Graney, 48 Cal. App. 773; Sec. 13, Art. I, Constitution.)

Defendant next assigns as error the admission in evidence of the books of account of the Jones Company. This ruling was correct. (Sec. 1953 f, Code Civ. Proc.) The books were kept in the company's office and were posted from "items which Mr. Jones handed back" to the bookkeeper who was directly employed by him. Appellant had continuous access to the records, frequently inspected them and showed clients their accounts. On closing his office he took the records with him. But in view of appellant's testimony that he had made the bottling contracts, received the warehouse receipts and sold the whiskey, there was no occasion whereby appellant could have been prejudiced by any books. Whether he had sold it in good faith for his corporation or fraudulently for his personal benefit was a question for the jury's determination.

The testimony of the salesmen of appellant was properly admitted. Each of them was directed by Jones to call upon the clients of the Jones Company to induce them to exchange their receipts for bottling contracts. They were to be paid $1.50 for each barrel of whiskey acquired. All "sellers" talked with Jones either before or after delivery of their receipts. The jury were warranted in finding that the representations of the salesmen were either first authorized or subsequently approved by appellant. (Robinson, *supra*, p. 226; *Bryant*, 101 Cal. App. 84, 89.)

Much of the briefs of appellant contain arguments properly addressed to triers of fact. They are of no concern to the appellate court where there is substantial evidence to support the verdict. (Estate of Winzler, 42 Cal. App. 2d 246, 248.)

The judgments are affirmed.

MOORE, *P. J.*

We concur:

WOOD (W. J.), *J.*

MCCOMB, *J.*

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 121

ROGER EVIN JONES,

Appellant,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA.

APPELLANT'S SUPPLEMENTAL MEMORANDUM

MORRIS LAVINE,
Attorney for Appellant.

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APPELLANT'S SUPPLEMENTAL MEMORANDUM

To the Honorable Harlan F. Stone, Chief Justice of the Supreme Court of the United States, and to the Honorable Associate Justices Thereof:

Permission is respectfully requested to file this supplemental memorandum brief. Since the petition for appeal was filed in this Honorable Court this Court has handed down the case of *Feldman* v. *United States,* 88 L. Ed. 1046, in which the question arose as to whether testimony given by an accused in a State court, and the State grants immunity in respect thereto, can be used against him in a Federal court.

The majority opinion, while holding that it can, nevertheless said that the governments of the States and the general government "are separate and distinct sovereignties, acting separately and independently of each other's spheres and the sphere of action appropriate to the United

States is as far beyond the reach of judicial process issued by a State judge or a State court as if the line of division was traced by landmarks and monuments visible to the eye." (Quoting from *Ponzi* v. *Fessenden*, 258 U. S. 254, 66 L. Ed. 607.)

In the *Jones* case at bar the Securities and Exchange Commission, under the compulsion of its subpoena, compelled Jones to bring in his books, papers and records before the Commission. Then the district attorney of Los Angeles proceeded to subpoena those books, papers and records from the Securities and Exchange Commission and had the Commission turn those documents over to the County Grand Jury of Los Angeles without ever returning them to Jones (R. 2 to 46). Thereafter these books, papers and records were all used in evidence against Jones in the trial which resulted in the present conviction. Had those books, papers and records been returned to Jones after the government had concluded with them, then Jones would have had a right, if he had been subpoenaed, together with these documents, to have claimed certain privileges and immunities under the laws of the State of California.

The question raised in the trial court, under a series of objections (R. 8), was that the government had no right to turn these documents over to the State and the State had no right to use them against Jones in his criminal trial after the government had gotten them, presumptively for one purpose, namely, for its own use, under a law which compelled Jones to bring them in.

Under the doctrines enunciated in the *Feldman* case it is respectfully submitted that this procedure violated the defendant's right of due process of law and his privileges and immunities guaranteed by the Fourteenth Amendment to the Constitution of the United States. In the *Feldman* case this Court said: "If a Federal agency were to use a

State court as an instrument for compelling disclosures for Federal purposes the doctrine of the *Byers* case, 273 U. S. 28, 71 L. Ed. 520, as well as that of *McNabb* v. *United States*, 318 U. S. 332, 87 L. Ed. 819, afford adequate resources against such an evasive disregard of the privileges against self-incrimination."

It is respectfully submitted that in this case a State agency used a Federal agency to compel disclosures for State purposes, and that for this reason this Court should take jurisdiction and decide this important question.

Appended hereto are quotations from the record in the trial of the *Jones* case which showed that a State agency used a Federal agency as an instrument for compelling disclosure for State purposes. The question raised then is whether this can be done. Under the Corporate Securities Act of the State of California, had the Commissioner of Corporations of the State of California compelled the production of the books in place of the Securities and Exchange Commission, the defendant could have claimed statutory immunity. (Act 3814, General Laws of California, Deering's Code as amended, Section 23). This section reads as follows:

> "*Statutes governing witnesses.* All the provisions of Chapter II of Title III of Part IV of the Code of Civil Procedure, relating to the means of production of evidence out of court, shall be applicable to any examination, investigation, or hearing under this act. No person shall be excused from testifying or from producing any book, document, or other thing under his control upon any such examination, audit, investigation, or hearing upon the ground that his testimony, or the book, document or other thing required of him, may tend to incriminate him, or may have a tendency to subject him to punishment for a felony, or to a penalty or forfeiture; but no person shall be prosecuted, punished or subjected to any penalty or forfeiture for or

on account of any act, transaction, matter, or thing concerning which he shall have been so compelled to testify under oath; provided, that no person so testifying shall be exempt from prosecution or punishment for perjury if committed by him in his testimony. The authority to make or conduct any such examination, audit, investigation or hearing, including the authority to administer oaths, and to subpena witnesses and take their testimony, may be delegated by the commissioner to any employee of the Division of Corporations appointed by him for that purpose. Such appointment shall be made by an instrument in writing, signed by the commissioner under his official seal, and upon such examination, audit, investigation or hearing, the same shall be produced by such employee of the Division of Corporations at any time upon demand therefor. (Amended by Stats. 1939, ch. 405.)"

The records having been secured by the Federal agency, Jones was powerless to claim his privileges and immunities granted to him under the State statute. This procedure therefore denied him the privileges and immunities of due process of law guaranteed by the Fourteenth Amendment of the Constitution of the United States. The question is one of importance in the relationship in Federal and State agencies and Federal and State immunity, and the case of *Feldman* v. *United States, supra,* would implicitly seem to hold that such procedure would not be tolerated if a Federal agency used it, and we respectfully submit that it should not be tolerated when a State agency used it nor should the evidence thus gained thereby be admitted.[1]

Respectfully submitted,

MORRIS LAVINE,
Attorney for Appellant.

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[1] In respect to immunity under the Corporate Securities Act of California, see *People* v. *White,* 124 Cal. App. 548.

The following is the testimony of James M. Evans, of the Securities and Exchange Commission, in the Superior Court of Los Angeles, most of which is in narrative form for the sake of brevity (R. 2-44).

Los Angeles, California,
Wednesday, October 28, 1942, 9:30 A. M.

The Court: People against Jones.

Mr. Frampton: The People are ready.

Mr. Lavine: We object to the jurisdiction of the court, as far as the defendant is concerned, to proceed to trial on the ground that the grand jury transcript, on which the trial is predicted, and that the proceedings which were had before the grand jury reveal the following having taken place on May 5, 1942.

JAMES M. EVANS was called and he testified as follows: It is very short and I will read it.

"Examination.

By Mr. Frampton:

Q. Your name is James M. Evans?

A. Yes.

Q. And your residence address is what?

A. 371 Rosita Court, Pasadena.

Q. You are connected with the local office of the Securities and Exchange Commission?

A. Yes, in the capacity of attorney.

Q. Pursuant to a subpena duces tecum, you have produced certain books and records, have you not?

A. Yes, sir.

Q. The books of R. E. Jones & Company and the Caledonia Development Company?

A. Yes.

Q. Those books were delivered to you pursuant to a subpena duces tecum issued by your Commission?

A. Yes.

Q. Who delivered those books to you personally?

A. R. E. Jones and his attorney, E. O. Leake.

Mr. Frampton: At this time I offer these books in evidence, the general ledger of R. E. Jones & Company, as Exhibit 1; general records of R. E. Jones & Company, as Exhibit 2; customers accounts receivable, R. E. Jones & Company, as Exhibit 3; general ledger of the Caledonia Development Company, as Exhibit 4; and the general record of the Caledonia Development Company, as Exhibit 5.

Are there any questions?

That is all, thank you, Mr. Evans."

Now, the grand jury record further reveals that there was testimony by Leonard K. Link, an auditor, employed by the company, based upon those records.

The Court: Employed by what company?

Mr. Lavine: Employed by R. E. Jones & Company, and that the testimony of Mr. Link is contained, starting on page 248 of the grand jury transcript, and he analyzes various things in the records and files, which were also produced under a subpena duces tecum to the Securities and Exchange Commission after the Securities and Exchange Commission had secured these books on a subpena duces tecum.

Now, I understand that it is a fact that Mr. Frampton asked the Securities and Exchange Commission to secure these books and records. Is that correct, Mr. Frampton?

Mr. Frampton: I will offer the stipulation that a subpena duces tecum was duly and regularly issued by the grand jury of Los Angeles County directed to the manager of the local office of the Securities and Exchange Commission, directing him to produce the books and records of R. E. Jones & Company, incorporated, and the Caledonia Development Company. That in response to that subpena, that the witness, Mr. Evans, who is connected with the local office of the Securities and Exchange Commission produced before the grand jury the books and records of those companies, respectively, referred to, and that they were offered in evidence before the grand jury of Los Angeles County.

Mr. Lavine: I accept that stipulation.

(Rep. Tr. p. 2 line 1 to p. 4 line 16.)

* * * * * * *

Mr. Lavine: Now, if your Honor please, under the Securities Exchange Act of 1934, Section 21, Subdivision (d), provides as follows:

"No person shall be excused from attending and testifying or from producing books, papers, contracts, agreements, and other records and documents before the Commission, or in obedience to the subpena of the Commission or any member thereof or any officer designated by it, or in any cause or proceeding instituted by the Commission, on the ground that the testimony or evidence, documentary or otherwise required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subject to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying."

Now, we have here a statute of the Securities and Exchange Commission under which Mr. Jones was compelled by reason of the subpena to produce certain documentary evidence before the Securities and Exchange Commission. That evidence was produced. It was then taken from that Commission to the County grand jury under a subpena issued by Mr. Frampton on the Commission. Now, it seems to me, your Honor, that the provisions of that Section are broad enough to protect the person under the situation from being compelled to produce the documents which he did produce under the compulsion of the subpena, and then to use them as a basis for an indictment in the State court in violation of that Section as set forth, and I submit that we object, therefore, to the jurisdiction of the court to proceed for the reasons set forth.

The leading case on the subject of immunity under the Federal courts, of course, is Counselman *v.* Hitchcock, in 142 U. S. 547. We have certain immunity statutes in the State. The *Rittenhouse* case, which was passed on by the Supreme Court, analyzes the immunity statute in connection

with Section 334 of the Penal Code of California. We have other immunity statute before our own Corporation Commissioner.

Now, another question that arises is can the People of the State of California do indirectly what could not be done directly? In other words, after the Securities and Exchange Commission secures the documents and records in this case under the compulsion of a subpena, could the State then come over and subpena a Federal official and do indirectly what they could not do directly if they had subpenaed Mr. Jones and the corporation officials directly, and I submit the matter to your Honor.

(Rep. Tr. p. 4 line 26 to p. 6 line 24.)

* * * * * * *

The Court: The objection is overruled. Are you ready to proceed?

Mr. Lavine: Ready, subject to that objection, and to the further objection that to try this defendant under the proceedings here, as a result of the claimed immunity, would be violative of the 14th Amendment to the Constitution of the United States * * * (p. 8 lines 12-18).

The Court: Overruled. Call a jury, Mr. Clerk.

(p. 8 line 23.)

James M. Evans, called as a witness on behalf of the People, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Frampton:

I have some official connection with the Securities and Exchange Commission. I am employed by the Securities and Exchange Commission, an agency of the United States Government. I had such a connection in the year 1941 and the early part of 1942.

My office is located at 1737 Federal Building, Los Angeles; it is called the Los Angeles Branch Office. I am a trial attorney and examining attorney for that office.

In the latter part of 1941 or the early part of 1942 the Securities and Exchange Commission was officially making an investigation of the business and affairs of R. E. Jones & Company, Incorporated, a corporation, also Caledonia Development Company, a corporation.

Mr. Lavine: Objected to as incompetent, irrelevant and immaterial and not within the issues here.

The Court: It is preliminary, apparently; overruled.

By the witness:

In connection with that investigation I caused to be issued in the due course of the investigation a subpena of the Securities and Exchange Commission, duces tecum, for the production of certain books and records of R. E. Jones & Company, Incorporated, a corporation.

(Here the Court overruled an objection by Mr. Lavine as irrelevant, immaterial and incompetent.)

By the witness:

I also caused to be issued a similar subpena for the books and records of the Caledonia Development Company, a corporation.

(Objection by Mr. Lavine as irrelevant, incompetent and immaterial, overruled by the Court.)

By the witness:

I do not have the original of those subpenas. My associate, Mr. O'Brien, who is in the court room, has them. The first document (witness is shown a sheaf of documents) is a duplicate or carbon copy of the original subpena directed to R. E. Jones & Company, requiring the production of books and records before the Securities and Exchange Commission at its office at 1737 Federal Building, Los Angeles, on March 12, 1942, at 2:30 P. M., in the matter of the United Bottling & Distributing Company and A. A. Slater and Company.

As I have stated, this document is a duplicate copy of the original which was served upon Mr. Jones, Mr. R. E. Jones, by me on March 11, 1942. That document calls for the books and records of R. E. Jones & Company. It does not call for any personal records of Roger E. Jones.

I left the original with Mr. Jones, and this copy is a part of our office files. It is not a public record, but it is an official record of the Government.

I have here a duplicate or a carbon copy of a subpena directed to Caledonia Development Company, requiring that company to produce its books and records at Room 1737 United States Post Office and Court House in Los Angeles, at the office of the Securities and Exchange Commission, on March 12, 1942, at 2:30 P. M., in the matter of United Bottling & Distributing Company and A. A. Slater & Company. The original of this subpena was served by me upon Mr. R. E. Jones on March 11, 1942. He is one and the same person as this defendant. The last document which I have read is an official record of the Securities and Exchange Commission. I have caused copies of those two subpenas to be made. These two documents to which you direct my attention are copies of the original subpenas now in my file.

The third document here is a subpena addressed to Roger E. Jones, requiring his attendance at Room 1737 United States Post Office and Court House of Los Angeles upon March 12, 1942, to testify in the matter of United Bottling & Distributing Company and A. A. Slater and Company. This document is a duplicate or carbon copy of the original which I served upon Mr. Jones personally in the office of his attorney on March 11, 1942.

There is a fourth document, which is also a subpena directed to Roger E. Jones, requiring him to appear at Room 1737 United States Post Office and Court House on March 12, 1942, at 2:30 P. M., to testify in the matter of R. E. Jones and Company and Caledonia Development Company. The original of this subpena was served by me upon Mr. Jones personally on March 11, 1942.

Mr. Jones and his attorney, at that time a Mr. E. O. Leake, appeared at our office on March 12, 1942, at about

2:30 in the afternoon. They brought with them and delivered to us four books and ledgers.

(The subpena directed to R. E. Jones and Company was offered and received in evidence as People's Exhibit 2 for identification.)

(The subpena directed to Caledonia Development Company was offered and received in evidence as People's Exhibit 3.)

(The subpena directed to Roger E. Jones in the matter of United Bottling and Distributing Company, et al., was offered and received in evidence as Exhibit 4.)

(The subpena directed to Roger E. Jones in the matter of R. E. Jones and Company, et al., was offered and received in evidence as Exhibit 5.)

(A book, referred to by Mr. Frampton for the purposes of description only as the general records of R. E. Jones and Company, Incorporated, was offered by him and received for identification only as People's Exhibit 6.)

By the witness:

This book to which you direct my attention, People's Exhibit 6 for identification, appears to be one of the books delivered to me after the service of the subpenas on Mr. Jones. I have no personal knowledge of the contents of the book, and I am not able to positively identify the book. However, it appears to be one of the books produced by Mr. Jones and Mr. Leake.

(A book, which Mr. Frampton referred to for the purposes of identification only as the general ledger of R. E. Jones & Company, Incorporated, was offered by him and received in evidence for identification only as People's Exhibit 7.)

By the witness:

People's Exhibit 7 appears to be one of the books delivered to my office after the service of the subpenas.

(A book, which Mr. Frampton referred to for the purposes of describing it only as a customers' accounts receivable of R. E. Jones & Company was offered by him and received in evidence as Exhibit 8 for identification.)

By the witness:

That book, Exhibit 8, appears to have been one of the books delivered to my office after the service of this subpena.

(A book, which Mr. Frampton described for the purposes of identification only as the general ledger of the Caledonia Development Company was offered and received in evidence as Exhibit 9 for identification.)

By the witness:

Exhibit 9 for identification appears to have been one of the books that was delivered to my office in response to this subpena.

(A book, which Mr. Frampton described for the purposes of reference only as the general records of Caledonia Development Company was offered by him and received in evidence as Exhibit 10 for identification.)

By the witness:

Exhibit 10 for identification appears to be one of the books delivered to my office after the service of the subpena.

After those books were in my possession or in the possession of the employes working under my supervision and direction, I received a subpena from the Los Angeles County grand jury in connection with these books, a subpena duces tecum; it was served upon Mr. Charles R. Burr, who is supervisor of our Los Angeles office, a subpena from the County grand jury of Los Angeles County, requiring the production of such books. In response to that subpena I produced before the Los Angeles County grand jury the same books that I had theretofore received from this defendant. Mr. Jones at no time claimed any privilege against

self-incrimination in connection with the service of these subpenas upon him.

Some time prior to the service of the subpena, I would say in the month of February, 1942, I had attempted to locate Mr. Jones, and had telephone conversations with his attorney, Mr. E. O. Leake. I advised Mr. Leake that I was desirous——

Mr. Lavine: I object to this as hearsay.

The Court: The objection is sustained.

A. As a result of telephone conferences with Mr. Leake——

Mr. Lavine: I object to that as a conclusion of the witness, whether it was as a result.

The Court: Following telephone conferences with Mr. Leake, is that what you mean?

A. Very well. I talked on the telephone to Mr. Leake. I also talked on the telephone with Mr. Jones of Downeyville, California, and Mr. Jones and his attorney stated that within a few days Mr. Jones would be in Los Angeles and he at that time stated that he would meet with us and we could have our conference. Subsequently I received notice that we could meet with Mr. Jones at the office of his attorney, Mr. Leake, in the Chester Williams Building. That was at about 11:00 o'clock a. m., on March 11, 1942. Mr. O'Brien of our office and myself went to the office of Mr. Leake in the Chester Williams Building on Fifth Street, Los Angeles, and there I met for the first time Mr. Jones, and we conferred for approximately an hour in Mr. Leake's office. All of my conversation with Mr. Jones was in the presence of Mr. Leake. At the outset of the talk, after introductions were had, I advised Mr. Jones, directing my interrogation and my statement to him, that he need not make any statement or answer any questions which would tend to incriminate him or subject him to a fine, penalty or forfeiture. I then asked him if he understood that and Mr. Jones looked at his attorney and Mr. Leake merely smiled and made a remark to the effect "That

we know all about that." That was the occasion of my having served Mr. Jones with the subpoena.

Four of the books were delivered to us on the following day. Upon examination of the books by Mr. O'Brien he stated that there was no general——

Mr. Lavine: I object to that as hearsay.

The Court: Sustained.

The Witness: After an examination of the books it was determined that there was no general ledger.

Mr. Lavine: I object to that as a conclusion of the witness and move to strike the answer.

By Mr. Frampton:

Q. After you examined the first group of books that were brought to your office did you call anyone in connection with any additional books?

A. The call was made to Mr. Leake.

Mr. Lavine: I object to that as not responsive. The question was whether he did it.

The Court: Isn't it just a little bit technical now?

Mr. Lavine: It is, your Honor.

The Court: The answer is stricken. Did you make the phone call to Mr. Leake, yes or no?

A. I did not.

By Mr. Frampton:

Q. Was the call made in your presence?

A. It was not.

There were more books produced; on March 13th the general ledger for R. E. Jones & Company was brought in to our office.

The conversation that I have related was the only admonition or warning that I ever made to Mr. Jones on the subject of his privilege or immunity from testifying or producing any records against him. There was no claim of privilege or immunity at the time that Mr. Jones in the presence of his attorney delivered the books to my office. There was no claim made by Mr. Jones or by Mr. Leake, his attorney.

Cross-examination.

By Mr. Lavine:

Those books came into our possession as a result of our subpoena.

Q. There was no duty on your part to turn them over to anyone, was there?

Mr. Frampton: That is objected to on the ground that it calls for an opinion or conclusion of the witness and is immaterial.

Mr. Lavine: He knows whether they are in *custodia legis* or not.

* * * * * * *

The Court: The objection is sustained.

By Mr. Lavine:

Q. You are an attorney at law, aren't you?

The Witness: Yes, sir.

Q. You are in charge of the records of the Los Angeles office and those records came into your possession as a result of your being in charge of the Los Angeles office, didn't they?

A. I am not in charge of the office.

Q. You were in charge of these particular records, were you not?

A. I was working upon the investigation through which these records were obtained.

Q. You knew as a matter of your own knowledge, did you not, that there was no duty or no requirement as a matter of law for you to turn these records over to anyone?

Mr. Frampton: That is objected to on the ground that it is not a proper statement of law and furthermore calls for a statement of a conclusion or opinion of this witness.

The Court: Sustained.

By Mr. Lavine:

Q. You knew you did not have to turn these records over to anyone, didn't you?

Mr. Frampton: That is objected to on the ground it calls for a conclusion or opinion of the witness.

Mr. Lavine: He knew.

Mr. Frampton: Upon the further ground that it is immaterial.

The Court: The objection is sustained.

By the Witness:

Four of these books came into our office on March the 12th and the fifth one came on March the 13th. Mr. Jones and his attorney carried the books in. I don't recall specifically if both of them carried them. They turned them over to me. There was no concealment about it. They obeyed the subpoena that I had issued for them. It was only after calling their attention that the fifth one, the general ledger had not been delivered that it was then produced, but it was produced.

I don't recall making a statement to Mr. Leake at that time that there was nothing being investigated as far as Mr. Jones was concerned.

I recall the conversation I had with Mr. Leake when I came into his office and he said, "Now, is Mr. Jones or his company under any investigation whatsoever?" I recall advising Mr. Leake that the investigation by the Los Angeles office was being instigated and was being made at that time at the request of our Chicago office. I don't recall making the statement at that time that Mr. Jones and Jones & Company were not under investigation.

I could not say when these subpoenas were written up. I can tell exactly whether they were written up at the same time or on different dates by referring to the subpoena. I have no independent recollection.

It is correct that our first subpoena here specifies that we ask Jones & Company to appear before our Commission to testify in the matter of United Bottling and Distributing Company and A. A. Slater & Company. I would not say that it was our first concern. It was one of our concerns.

I decline to answer the question as to whether previous to that time I had been asked by anyone else than the

Chicago office to make the investigation, upon the ground that the investigation of the Government is confidential.

By Mr. Lavine:

Q. You have here testified to some matters. Do you now claim your privilege as to these matters that I am about to ask you with reference to any other person? Let me ask you this question, and if you feel that it is something you want to claim you- privilege I recognize the law in that respect. Were you requested by the District Attorney's office of Los Angeles County to make any investigation in this matter?

A. In what matter?

Q. In the matter of R. E. Jones or R. E. Jones & Company or the United Bottling and Distributing Company and A. A. Slater & Company?

A. The investigation of the Securities and Exchange Commission was made at its own instance and not at the instance of the District Attorney here.

Q. That does not answer my question.

Mr. Frampton: I submit that it does.

By Mr. Lavine:

Q. That is not my question. I asked you if you had been asked by the District Attorney's office, regardless of whether you made an investigation at your own instance or not, had you been asked by the District Attorney's office prior to that time to make such an investigation?

A. Prior to what time?

Q. Prior to March 12, 1942?

A. To my knowledge the District Attorney of Los Angeles County never requested us to make an investigation.

Q. Did the District Attorney's office of Los Angeles County request you to get these books and records for it?

A. No, they did not.

Q. At no time?

A. The books were gotten at the instance of the Securities and Exchange Commission under its own subpoena.

Q. I recognize that you issued your own subpoena, but had the District Attorney's office of Los Angeles County requested you to issue that subpoena?

A. I don't recall, but it would be immaterial whether it did, because we would issue only at the instance of our own Commission, and not at the instance of any one else.

Q. It is material to my inquiry, Mr. Evans, so I would appreciate if you would tell me whether you did receive such a request for the issuance of the subpoena by any one in the Los Angeles County District Attorney's office prior to March 12, 1942.

A. I don't recall such a request having been made on our Commission.

Q. Was it made to you?

A. It was not made to me.

Q. Did you have any conference with anybody in the Los Angeles County District Attorney's office with reference to the securing of these books and records?

Mr. Frampton: That is objected to on the ground that it is wholly immaterial to any issue in this case.

The Court: The objection is sustained.

Mr. Lavine: The People have opened it up, your Honor, as to the securing of those books and records under the Securities and Exchange Act, and I think I am entitled to go into the whole transaction.

The Court: Now, having expressed yourself, and the Court having ruled, we are ready for the next question.

By Mr. Lavine:

Q. Now, prior to March 2, 1942,—prior to March 2, 1942, did you go to the Los Angeles County District Attorney's office in reference to any investigation in this case?

Mr. Frampton: Objected to on the ground that it is wholly immaterial.

The Court: Oh, it is, unless it might go solely and singly to the question of bias, interest, prejudice, malice, feeling, if any,——

Mr. Frampton: If that is what he is after, I will withdraw my objection.

The Court: And for that limited purpose only the Court will permit an answer. Read the question, Mr. Reporter.

(Question read.)

The Court: Will you answer that?

A. I don't recall the specific dates. I know I had numerous telephone conversations or frequent conversations with Mr. Frampton, as I knew that his office was investigating the whisky matters, or this particular matter, and he knew that the Federal Government was also conducting similar investigations.

By Mr. Lavine:

Q. Do you remember when you had your first conversation with him about it, what month?

A. No, I don't recall.

Q. Your investigation resulted in no action whatsoever in the Los Angeles courts against Mr. Jones, did it?

A. I decline to answer that, Mr. Lavine.

Q. You know as a matter of public record. If it did there is a public record on it, and if it didn't that there is no public record on it.

Mr. Frampton: We will object to it on the further ground that it is immaterial. He stated that the investigation was at the instance of Chicago office, and not this office.

The Court: The objection is sustained. It is immaterial, anyhow.

By Mr. Lavine:

Q. And, in any event, on what date did you turn these books over to Mr. Frampton?

Mr. Frampton: Objected to on the ground that it assumes a fact not in evidence.

Mr. Lavine: That is correct.

By Mr. Lavine:

Q. What date did you turn these books over to the grand jury on Mr. Frampton's subpoena, the subpena issued by the County grand jury by Mr. Frampton? I will get it all in.

Mr. Frampton: That is objected to on the ground that it is wholly immaterial and assumes a fact not in evidence.

The Court: The objection is sustained.

By Mr. Lavine:

Q. Do you remember what date you brought the books over here to the Hall of Justice?

A. Yes, I recall the date.

Q. What date was that?

A. The books were brought over here by me on May the 5th, 1942.

Our office received a letter from Mr. Leake, the letter dated May the 21st, I believe, and received by our office on May the 22nd, 1942, in which he demanded a return of the five books. As to whether in that letter he stated to me that I had desired to check the books with reference to the transactions of the United Bottling Company of Chicago, I don't have a copy of the letter with me.

We had the books from March 12th until May 5th. Those books had been left with me by Mr. Leake and Mr. Jones personally. I don't recall making the time limit of three or four days that we would return those books to him. I recall stating to Mr. Leake that we expected to get through with the books as quickly as possible, and would then return them to him. After that the books were never returned to Mr. Leake, as I advised him we had been served with the grand jury subpena. I didn't advise him of that until after he wrote to me and asked me about them on May 21st. I advised Mr. Leake by telephone on April the 28th that our office had been served with a grand jury subpena, and that the books would be retained by us until I received further notice from my superiors, and then on May the 4th I advised the R. E. Jones & Company and Caledonia Development Company, in care of Mr. Leake, that I had been instructed by my superiors to respond to the grand jury subpena and deliver the books to the grand jury on May the 5th.

I have never made any demand upon the District Attorney's office of Los Angeles County for the return of those books. A receipt was given for the four books delivered on March the 12th,—to Mr. Leake and Mr. Jones. There

was one delivered on the subsequent day and I was not there at the time it was brought into the office; possibly the young lady in the reception room gave a receipt for it; I don't know.

Redirect examination.

By Mr. Frampton:

There appears to be missing from Exhibit 2 the document consisting of four paragraphs setting forth the books and records requested to be delivered by the subpoena.

(With the Court's permission Mr. Frampton reads from the original subpoena the books and records called for:)

"All journals and books of original entry of R. E. Jones and Company, commonly designated as journals, cash books, purchase and sales books, containing entries made from April 1, 1939, to March 1, 1942, in respect to transactions occurring within said period and showing receipts and disbursements of R. E. Jones and Company occurring during said period.

"All statements of account between R. E. Jones and Company and United Bottling and Distributing Company and A. A. Slater and Company, which statements will reflect the amount and size of said accounts during the period from April 1, 1939, to March 1, 1942.

"All customers ledgers or lists containing the names to whom or from whom whiskey warehouse receipts and/or barrels of whiskey were purchased or sold by R. E. Jones and Company and all customers ledgers, lists or records containing the certificate numbers and serial numbers of barrels of whiskey purchased from R. E. Jones and Company and/or sold or delivered to United Bottling and Distributing Company or A. A. Slater and Company or John Factor, from April 1, 1939, to March 1, 1942.

"All original correspondence or copies thereof between R. E. Jones and Company or its officers or employees acting therefor and United Bottling and Distributing Company, A. A. Slater and Company or John Factor."

By the witness:

That is the description of the records that were required.

Recross-examination.

By Mr. Lavine:

Mr. Jones and Mr. Leake appeared with the four volumes a few minutes before 2:30, the time specified in the subpoena. The fifth record was delivered the following day at about noon, I believe. They brought them right into my office in the Federal Building. I didn't have to send any messenger or a delivery boy down after them.

In talking to Mr. Leake and Mr. Jones, I don't recall stating that it would be an accommodation to my Commission if I could receive these books and keep them in my office for a while, for a matter of days or longer. I recall that I stated to Mr. Leake that our Mr. O'Brien, who is associated with me upon the investigation, was an auditor and an accountant, that he was then engaged upon another matter and he hoped to finish up as shortly as possible in order to get the time to examine these books and records, and they said that was all right for me to keep them and examine them for such a period of time as I needed to make that examination.

(Reporter's Transcript pages 16 to 44.)

DECISIONS PER CURIAM, ETC., FROM OCTOBER 2, 1944, THROUGH JANUARY 29, 1945.*

No. 121. JONES *v.* CALIFORNIA. Appeal from the District Court of Appeals, 2d Appellate District, of California. October 9, 1944. *Per Curiam:* The appeal is dismissed for want of jurisdiction. § 237 (a), Judicial Code, as amended, 28 U. S. C., § 344 (a); *Memphis Gas Co.* v. *Beeler,* 315 U. S. 649, 650–651, and cases cited. Treating the papers whereon the appeal was allowed as a petition for writ of certiorari as required by § 237 (c) of the Judicial Code, as amended, 28 U. S. C., § 344 (c), certiorari is denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case. *Mr. Morris Lavine* for appellant. Reported below: 61 Cal. App. 2d 608, 143 P. 2d 726.